(2)

No. 05-1160

SUPREME COURT, U.S.
FILED
JUN 2 2 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

STATE OF UTAH; UTAH DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah municipal Corporation,

Petitioners,

vs.

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & CO. dba KUNZ OUTDOOR ADVERTISING, a California Corporation; GALE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL McCALEB, in his capacity as Assistant Secretary of Interior, Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director, Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Petitioners seek this Court's resolution of whether Congress has unconstitutionally delegated its duty to legislate by giving the Secretary of the Interior unilateral discretion to take any land into trust "for Indians," while providing no "intelligible principle" or standards to cabin the exercise of that discretion. The case for review is premised on the Tenth Circuit's disregard of this Court's nondelegation doctrine precedents; its approval of the Shivwits Band's marketing of its exemption from state regulation to a non-Indian billboard company; its erroneous resort to selective legislative history to save a statute that provides no boundaries to guide the executive branch's exercise of the sweeping power granted; and the severe infringements on state sovereignty, jurisdiction, and regulation that trust land acquisitions inflict nationwide.[1]

Respondents offer no substantial reason for the Court to avoid assessing the constitutionality of this grant of carte blanche authority to the Secretary of Interior in section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Instead, respondents first defend the Tenth Circuit's erroneous decision by noting that other circuits have reached the same conclusion,[2] one they claim is consistent

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[1] The nationwide impact and importance of § 465 are underscored by the filing of a brief *amicus curiae* by 17 states supporting Utah's petition, as well as by South Dakota's recent filing of a petition for a writ of certiorari in *South Dakota v. United States Dep't of the Interior*, 423 F.3d 790 (8th Cir. 2005) ("*South Dakota II*"), pending as U.S. No. 05-1428, which presents the same issue as Utah presents here.

[2] *South Dakota II*, 423 F.3d at 796; *Carcieri v. Norton*, 423 F.3d 45, 57 (1st Cir. 2005), *petition for reh'g en banc pending*. The federal respondents erroneously cite *Confederated Tribes of Siletz Indians v.*

(Continued on following page)

with *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001). Band's Br. in Opp. at 11-12, 18-19, 21; Fed. Br. in Opp. at 14-15.

They also argue that this is an isolated case because regulations adopted in 1995 and 1996 require the Secretary to weigh local concerns more heavily during the pre-acquisition process and provide for judicial review of a decision to take land into trust "for Indians." Band's Br. in Opp. at 6-7, 15-16; Fed. Br. in Opp. at 5 n.2, 18, 22-23. The respondent Band claims that, even if the statute **is** unconstitutional, this Court is barred by the Quiet Title Act, 28 U.S.C. § 2409a(a) ("QTA"), from providing petitioners any meaningful relief. Band's Br. in Opp. at 8, 15, 17-18. Alternatively, the federal respondents suggest that the QTA erects a jurisdictional bar to this Court's consideration of petitioners' challenge to the constitutionality of § 465. Fed. Br. in Opp. at 20-21. These responses merely confirm the errors in, and the pressing need for review of, the decision below.

ARGUMENT

1. As this Court has held, a statutory delegation of power to the executive branch is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (internal quotation omitted). The Band

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United States, 110 F.3d 688 (9th Cir. 1997), as likewise rejecting a claim that § 465 violates the nondelegation doctrine. Fed. Br. in Opp. at 12. The court's description of § 465 as a "valid delegation" is dictum, as the constitutionality of a section of the Indian Gaming Regulation Act, not of § 465, was at issue. *Siletz*, 110 F.3d at 691, 696, 698.

recognizes the importance of, and the severe impingements on, state sovereignty that flow from the Secretary's exercise of the broad power delegated by § 465. *See* Band's Br. in Opp. at 5. But, like the Tenth Circuit, the Band and the federal respondents ignore this Court's holding in *Whitman* that, under the nondelegation doctrine, "the degree of agency discretion that is acceptable varies according to the scope of power constitutionally conferred." 531 U.S. at 475.

In *Whitman*, this Court concluded that the delegated power to promulgate air quality standards affecting the entire nation required "substantial guidance" from Congress. *Id.* Here, the Secretary has been granted unilateral authority to take land – in any amount, in any place, for any purpose – into trust "for Indians," thereby withdrawing the land from state jurisdiction, taxation, and regulation. *See* Pet. 17-22. Yet the respondents and the Tenth Circuit (as well as the First and Eighth Circuits) have refused to follow *Whitman* and analyze the constitutional acceptability of the unbounded discretion given the executive branch by § 465 in light of the far-reaching power bestowed. This mandated analysis would have led ineluctably to a conclusion that § 465 violates Article I, section 1 of the Constitution. *See* Pet. 8-14.

2. Respondents do not defend or even address the Tenth Circuit's disregard of precedent by allowing the Shivwits Band to market their exemption from state taxation, jurisdiction, and regulation to non-Indians. This practice was disapproved by this Court in the taxation context in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980). *See* Pet. 19.

Contrary to the impression created by the federal respondents, § 465 acquisitions do not just involve regaining lost allotments or reasserting tribal sovereignty over

Indian territory taken away in decades past. Petitioners challenge a statute that is incomparably broad in its delegation of Congress's legislative power and starkly free from meaningful constraints on its exercise. As this case demonstrates, § 465 allows the Secretary to acquire land that is within a city's limits, far from a tribe's reservation and along an interstate freeway, and then to permit a non-Indian lessee to use the land for its own pecuniary benefit, free from local taxes and reasonable regulations. Denial of certiorari under these troubling circumstances will give the green light to non-Indian businesses across the country to pursue and enjoy – with the Secretary's help – the clear advantages of federal trust protection that are supposedly intended for Indians.

3. The respondent Band concedes that the Secretary's regulations cannot save § 465 from constitutional challenge under the nondelegation doctrine. Band's Br. in Opp. at 16 (citing *Whitman*, 531 U.S. at 472-73); *see also* Fed. Br. in Opp. at 5 n.2. The Band nonetheless argues that this is an isolated case because, under a new regulation, 25 C.F.R. § 151.11(b), the Secretary must give "greater weight" to local governments' concerns expressed during the comment period about "potential impacts on regulatory jurisdiction, real property taxes and special assessments," 25 C.F.R. § 151.11(d) (Band's App. C). As petitioners have already demonstrated, however, this new regulation sets no meaningful limit on the Secretary, even if it had come from Congress and not from the Secretary. Pet. 20-21.

Citing the argument of counsel in a three-year-old memorandum, unsupported by any record evidence, the Band mistakenly represents to the Court that, because of the new regulation, no other applications by the Paiute Tribe or the Shivwits Band have been approved since 1995. Band's Br. in Opp. at 16 & n.12. In fact, one such

application, filed in March 2004, was approved just last month. App. 3. Two other trust land applications by the Cedar City Band of Paiute Indians, involving more land in southern Utah that the Tribe plans to use for billboards, have been "pending" since at least 1999,[3] presumably awaiting final resolution of the instant litigation. In short, there is no evidence that the new regulation has thwarted this tribe's – or any others' – applications for trust land acquisitions or has changed the Secretary's pattern of approving off-reservation trust acquisitions despite grave local concerns.

Respondents also try to minimize the importance of the question presented here by asserting that, under a 1996 regulation adopted by the Secretary, there will be judicial scrutiny of proposed trust acquisitions before land is taken into trust by the United States. Band's Br. in Opp. at 7; Fed. Br. in Opp. at 22; *see* 25 C.F.R. § 151.12 (Band's App. D). This is not necessarily so, since regulations can always be changed or waived by the Secretary. *See* 25 C.F.R. § 1.2. They can also be ignored. In this case, the Regional BIA Director admitted that the evaluation of the Band's trust application did not consider the criterion in 25 C.F.R. § 151.10(f) (jurisdictional problems and potential land use conflicts). Pet. App. 101.

The spirit of the agency's regulations can also be ignored, even if their letter is followed. For example, 25 C.F.R. § 151.11(d), the regulation requiring notice to state and local governments upon receipt of trust applications, took effect July 24, 1995. 60 Fed. Reg. 32874, 32879 (June 23, 1995). No notice was given to Utah of either the then-pending August 1994 application by the Band or of the

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[3] Petitioners' counsel of record's telephone conversation with Jeff Zander, Trust Resource Director, Paiute Indian Tribe (June 2, 2006).

Secretary's August 1995 decision to approve the Band's application and take title. *See* Pet. App. 19. The Secretary's position at that time was that the decision to take land into trust under § 465 was not judicially reviewable. *See United States Dep't of the Interior v. South Dakota*, 519 U.S. 919, 921-22 (1996) (Scalia, J., dissenting). It was not until April 1996 that the Secretary did an about-face and hastily adopted another regulation, 25 C.F.R. § 151.12, delaying the actual taking of title for 30 days after the decision to approve a trust application. *See South Dakota*, 519 U.S. at 921-22. Thus, like South Dakota, Utah had no opportunity to object to, or obtain judicial review of, the Secretary's actions prior to the taking of title by the United States.

Even today, nothing in the agency's regulations prevents the Secretary from taking title to land under § 465 immediately at the expiration of the 30-day comment period required by 25 C.F.R. § 151.12, even if judicial review has been initiated by objectors. And once title is taken, the Secretary has consistently maintained, and the Tenth Circuit has held here, that the QTA bars a claim – whether asserted under the APA or another statute – seeking to divest the United States of title to Indian trust land. Pet. App. 16-19; *see* Fed. Br. in Opp. at 5 n.2.

This point was not lost on Justice Scalia in his dissent from the decision in *South Dakota*, 519 U.S. at 921, to grant the United States' petition for a writ of certiorari, vacate the decision below holding § 465 unconstitutional, and remand to the Secretary for reconsideration of the trust acquisition. He noted the Secretary's published preamble to then-new 25 C.F.R. § 151.12 asserted that it "permits judicial review before transfer of title to the United States" and that the government had conceded only that APA review is available before the Secretary's taking of title under the IRA. As Justice Scalia aptly concluded, "It is

inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view. . . . " *Id.* at 922.

In any event, the Court has more recently made clear that any regulations adopted by the Secretary, including those intended to counter constitutional challenges to § 465 – such as the instant case, the *South Dakota* cases, and *Carcieri* – do not inform proper analysis of whether Congress has violated the nondelegation doctrine. *See Whitman*, 531 U.S. at 472-73.

4. The respondent Band contends certiorari should be denied because the Court lacks power to grant petitioners any "meaningful relief" even if § 465 is unconstitutional: (a) title to the lands has already been taken by the United States;[4] and (b) the QTA retains governmental immunity from suits seeking to divest the United States of title to Indian trust lands. Band's Br. in Opp. at 17-18. The federal respondents assert that the Tenth Circuit's conclusion that the QTA bars the petitioners' third-party complaint against them also prevents the Court from reaching the constitutional issue here. Fed. Br. in Opp. at 21. There are several interrelated responses to these contentions.

First, respondents ignore the fact that petitioners were defendants in the district court action. As sovereigns or quasi-sovereigns, Indian tribes have enjoyed immunity from "judicial attack," but only absent consent to be sued. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998). Here, Kunz and the Band sued petitioners, seeking a declaration that the subject lands are lawfully held in trust by the United States pursuant to

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[4] This factual twist is not present in *South Dakota II* since the land at issue was removed from trust status by the Secretary after remand from this Court. 423 F.3d at 793.

§ 465 and, thus, not subject to any federal, state, or local billboard regulations. Pet. App. 6. Whatever immunity Kunz and the Band had, it was waived when they made that claim the subject of their lawsuit, thereby consenting to adjudication of the validity of § 465. "[The tribe's i]nitiation of a lawsuit is an action that 'necessarily establishes consent to the court's adjudication of the merits of that particular controversy,' including the risk of being bound by an adverse determination." *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (citations omitted);[5] *e.g.*, *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) (tribe waived immunity by filing quiet title action and asking court to resolve ownership of disputed land); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) (tribe consented by intervening as plaintiff to establish its treaty fishing rights).[6]

Second, the QTA waives governmental immunity by allowing the United States "to be named **as a party defendant** in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest," except "trust or restricted Indian lands. . . ." 28 U.S.C. § 2409a(a) (emphasis added). But nothing in the

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[5] Similarly, when the United States files suit, it waives immunity and consents to full adjudication of all matters raised in its complaint. *United States v. Tsosie*, 92 F.3d 1037, 1043 (10th Cir. 1996). If this were not so, criminal defendants like that in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1960 (2000), could not attack the constitutionality of § 465 in order to challenge federal court jurisdiction to prosecute them for crimes committed on trust lands that are "Indian country." *See* Pet. 17-18.

[6] Unlike *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991), the instant case is not one in which a defendant seeks to recover money from a tribe through a counterclaim. Here, petitioners simply seek a determination of the constitutionality of the statute about which Kunz and the Band sought declaratory relief.

QTA prevented petitioners from asserting the unconstitutionality of § 465 as a defense against plaintiffs Kunz and the Band (or against the United States, if it had joined them as a plaintiff). As this Court has recognized, this is precisely what persons asserting title to land claimed by the United States had to do before the QTA waived governmental immunity from suits over title disputes to non-trust lands, i.e., wait to be sued by the United States and then assert their adverse title claim. *See Block v. North Dakota*, 461 U.S. 273, 280 (1983).

Third, the QTA does not prevent this Court from granting relief to respondents if it declares that § 465 violates the nondelegation doctrine. If the Court were to reverse the lower courts and hold § 465 unconstitutional, this would afford petitioners declaratory relief, as they originally requested. Moreover, the Court's disposition would necessarily vacate the declaratory judgment and injunctive relief granted to Kunz and the Band by the district court against the petitioners, which was premised on the validity of § 465. This would itself constitute another form of relief requested by petitioners. *See* Pet. App. 6; First Amended Answer, Claim, and Third-Party Claim at 18, 28, 30. Both forms of relief are "meaningful" and neither contravenes the QTA.

Finally, the Court should reject the federal respondents' contention that the QTA deprives it of the power to even address whether § 465 violates Article I, section 1. Respondents ignore the important distinction between this constitutional claim and petitioners' other, nonconstitutional claim that the Secretary violated applicable statutes and regulations in taking the subject land into trust. A few circuits have held the latter category barred by the QTA's retention of immunity if successful review under the APA would divest the United States of title to Indian trust

lands. *See* Fed. Br. in Opp. at 21. But even the federal respondents cite a case that recognizes sovereign immunity does not apply to federal officials alleged to have acted unconstitutionally. *Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1251-52 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). Indeed, the Tenth Circuit tacitly honored this distinction here by first addressing the constitutional claim and then determining that the non-constitutional claims are barred by sovereign immunity that the QTA retains. *See* Pet. App. 9, 18, 33.

CONCLUSION

For the foregoing reasons and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK L. SHURTLEFF
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Counsel for Petitioners

June 2006

**Counsel of Record*

APPENDIX

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WESTERN REGION
P.O. Box 10
Phoenix, Arizona 85001

May 19, 2006 [receipt date stamped]

CERTIFIED MAIL – RETURN
RECEIPT REQUESTED

Mr. Mark Shurtleff
State of Utah, Office of the Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Dear Mr. Shurtleff:

This is in reference to a proposed trust acquisition of a 6.8-acre tract on behalf of the Paiute Indian Tribe of Utah (Tribe). The Tribe has stated that the intended use of the property is for the construction of a tribal healthcare facility to serve tribal members. Subject parcel is located in Cedar City, Iron County, Utah, and is further described as follows:

PARCEL 1:

Beginning at a point south 00°09'22" west along the 1/16 Section line 481.30 feet and south 89°08'06" west 313.77 feet from the center east 1/16 corner of Section 11, Township 36 South, Range 11 West, Salt Lake Base and Meridian and running thence south 89°08'06" west 562.56 feet; thence south 01°53'26" east 104.56 feet; thence 98.65 feet along the arc of a curve to the left through a central angle of 08°24'05" and a radius of 672.80 feet; thence north 89°07'36" east 551.88 feet; thence north 00°54'48" west 202.62 feet to the point of beginning and subject to a 20

foot wide utility and drainage easement along the north boundary and subject to a 20 foot wide utility easement centered on the existing sewer line.

PARCEL 2:

Beginning at a point south 00°09'22" west along the 1/16 section line 481.30 feet from the center east 1/16 corner of Section 11, Township 36 South, Range 11 West, Salt Lake Base and Meridian and running then south 89°08'06" west 313.77 feet; thence south 00°54'48" east 593.49 feet; thence north 89°41'26" east 302.65 feet; thence north 00°09'22" east 596.52 feet to the point of beginning and together with a 20 foot wide utility and drainage easement along the north boundary of the recreation parcel described heretofore.

Subsurface rights to subject parcel are subject to prior reservations.

The Bureau of Indian Affairs (BIA) must review all acquisition proposals prior to making a decision as to whether land can be placed into trust status for a tribe. In making such a determination, we must follow the BIA's trust land acquisition regulations in Title 25, Code of Federal Regulations (CFR), Part 151, as amended (see particular rule changes published in the Federal Register on Friday, June 23, 1995, Vol. 60, No. 121, and Wednesday, April 24, 1996, Vol. 61, No. 80). The major procedures we must comply with are listed in Sections 151.9-151.14.

After our review and evaluation of the Tribe's request on this case, we have concluded that the proposed acquisition of the 6.8-acre tract would be in the best interest of the Tribe. The addition of subject property to the Tribe's reservation land base for the purpose of constructing a

tribal healthcare facility to serve tribal members will further tribal self-determination and enhance the well-being of the Tribe. This acquisition will thus satisfy 25 CFR 151.3(a). We have determined that the acquisition would be consistent with applicable guidelines and serve the best interest of the Tribe. Therefore, by our memorandum dated May 17, 2006 (copy enclosed), this office preliminarily approved the trust acquisition of the 6.8-acre tract. Enclosed is a copy of a letter dated May 17, 2006, to the Chairwoman of the Paiute Indian Tribe of Utah, reflecting our ***intent*** to take the subject tract into trust.

As prescribed under the land acquisition regulations and implementation instructions, we are required to include notice of administrative appeal rights under 25 CFR Part 2, in case you wish to appeal this decision. However, because the decision to approve the proposed acquisition is being made at the Bureau's Regional Office level, it may be appealed directly to the Interior Board of Indian Appeals (IBIA) in accordance with the regulations in 43 CFR 4.310-4.340. The IBIA is located at the following address:

U.S. Department of Interior
Interior Board of Indian Appeals
Office of Hearing and Appeals
801 N. Quincy St., Suite 300
Arlington, Virginia 22203

Your notice of appeal to the IBIA must be signed by you or your attorney and ***must be mailed within 30 days of the date you receive this decision***. It should clearly identify the decision being appealed. You must send copies of your notice to appeal to (1) the Assistant Secretary – Indian Affairs, U.S. Department of the Interior, 4140 MIB, 1849 C Street, N.W. Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your notice of

appeal sent to the IBIA must certify that you have sent copies to all necessary parties. If you file a notice of appeal, the IBIA will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing notice of appeal.

We have enclosed a copy of 43 CFR 4.331-4.340. If you have any questions regarding this matter, please contact our Branch of Real Estate Services (602) 379-6781.

Sincerely,

Catherine Wilson [signature]
Acting Regional Director

Enclosures